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No. 04-120

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

J. B. PARKER,

Petitioner,

—v.—

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE PETITION

Parker's petition established that this Court should grant certiorari to address two important issues: 1) whether in felony murder cases *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 124 S. Ct. 2531 (2004), mandate that the jury decide whether the defendant acted with the constitutionally required *mens rea* under *Tison v. Arizona*, 481 U.S. 137 (1987), and *Enmund v. Florida*, 458 U.S. 782 (1982), to render him eligible for the death sentence; and 2) whether under *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Michigan v. Jackson*, 475 U.S. 625 (1986), evidence of a defendants' pre-rights invocation state of mind is competent to establish the incarcerated defendants' post-rights invocation initiation of a further interrogation. Significantly, the State makes no effort to address either question on the merits – the State does not dispute that *Ring* and *Blakely* mandate a jury determination of the *Tison* and *Enmund* factors, and does not dispute that *Edwards* and *Jackson* require post-rights invocation evidence of initiation. Instead, the State asserts that neither issue is properly presented. As we show below, both issues are properly presented and warrant Supreme Court review.

A. The Court Should Grant the Petition to Address the Application of *Ring* to Imposition of the Death Penalty in Felony Murder Cases and the Continued Validity of *Cabana v. Bullock*

The State contends that the first question presented: 1) was never raised in the State courts; and that 2) because Parker was "found to be the actual shooter," as a matter of fact, this case does not implicate the continued validity of *Cabana v. Bullock*, 474 U.S. 376 (1986), in light of this

Court's more recent decisions in *Ring* and *Blakely* (Opp. at 7-10).[1] Neither argument is grounds for denying the petition.

1. The Validity of the Florida Death Sentencing Statute Under *Ring* as Applied to Parker Was Raised in the State Courts

It is beyond dispute that Parker challenged in the state courts the validity under *Ring* of the Florida death sentencing statute as it applied to him. *See Parker v. State*, 873 So. 2d 270, 294 (Fla. 2004) ("*Parker VI*"). The Supreme Court of Florida rejected that claim on the ground that, because Parker had been convicted in 1983 of robbery and kidnapping, in addition to first degree murder, and because the commission of such felonies was one of the aggravating factors found by the trial court at the re-sentencing proceeding in 2000, the requirements of *Ring* that his eligibility for the death penalty be established by unanimous jury verdict had been satisfied. *Id.* As Parker had argued in the Supreme Court of Florida, however, in so concluding that court failed to recognize the requirements of *Zant v. Stephens*, 462 U.S. 862, 877 (1983), that the factors to be assessed in imposing the death penalty "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." The heightened *mens rea* requirements of *Tison* and *Enmund*, serve this precise narrowing function.

That Parker did not cite *Tison* or *Enmund* in support of his argument does not establish that he failed to preserve this issue for Supreme Court review. What Parker argued before the Supreme Court of Florida was that *Ring* requires that all factors supporting the imposition of the death penalty be found by a unanimous jury beyond a reasonable doubt.

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[1] References to "Opp. at __" are to the State's brief in opposition to the petition for certiorari.

That is the issue presented here. In the face of the Supreme Court of Florida's rejection of Parker's argument through its determination that it is sufficient under *Ring* that the jury verdict on conviction necessarily included findings in support of a single aggravating factor – the so-called "felony murder aggravator" – Parker seeks Supreme Court review of the validity, under the Sixth Amendment of the imposition of a death sentence for a felony murder conviction where only the underlying felonies, but not the heightened *mens rea* requirements of *Tison* and *Enmund,* were the subject of a jury verdict.

The cases the State cites (Opp. at 8) in support of its contention that Parker's petition should be rejected for failure to present this issue to the state courts stand only for the proposition that the federal question sought to be raised in this Court must first be properly presented to the state court. The federal question here – whether the imposition of the death sentence at Parker's re-sentencing proceeding comports with the Sixth Amendment requirements, as articulated in *Ring* – indisputably was presented to the state courts. As this Court's precedents make abundantly clear, to meet the requirement that federal questions to be reviewed by this Court first be presented to the state court:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); *see also PruneYard Shopping Ctr. v. Robins*, 447

U.S. 74, 86 n. 9 (1980); 22 James Wm. Moore et al., *Moore's Federal Practice* § 406.05 (3d ed. 2004) (in determining whether federal questions have been adequately raised in state court proceedings, "inflexible specificity" is not required (quoting *Webb v. Webb*, 451 U.S. 493 (1981))).

2. Parker Was Entitled to a Jury Determination that the Heightened *Mens Reas* Requirements of *Tison* and *Enmund* Were Met

The critical inquiry under *Ring* and *Blakely* is whether Parker received the jury determination guaranteed by the Sixth Amendment of all facts upon which an increase in punishment is conditioned. *Tison* and *Enmund* teach that, in death penalty cases in which the defendant stands convicted of felony murder, an increase in punishment (i.e., imposition of a death sentence) is conditioned upon the existence of the heightened *mens rea* articulated in those decisions. The only unanimous jury determination Parker ever received of any facts was when, at the guilt/innocence phase of his 1983 trial, the jury concluded that he was guilty of first degree murder, robbery and kidnapping. That verdict expressly did not include a finding that Parker had acted with the *mens rea* that *Tison* and *Enmund* mandate for imposition of a death sentence in felony murder cases. As both the Eleventh Circuit and Supreme Court of Florida were subsequently to conclude, however, that guilty verdict was sustainable on appeal solely on grounds of felony murder. *See Parker v. Singletary*, 974 F.2d 1562, 1576 (11th Cir. 1992) ("*Parker IV*"); *State v. Parker*, 721 So. 2d 1147, 1152 (Fla. 1998) ("*Parker V*").

In attempting to contradict those appellate court findings, the State cites (Opp. at 7-10): 1) evidence those courts viewed as insufficient, standing alone, to support a conviction for premeditated murder (Parker's alleged statement to a girlfriend, Georgeann Williams, of Parker's

co-defendant, John Earl Bush);[2] and 2) testimony that was not heard by the jury at Parker's 1983 trial (the testimony of co-defendant Terry Wayne Johnson which was introduced only at the 2000 re-sentencing proceeding).[3] That at the re-sentencing proceedings seventeen years later, in 2000, the jury heard additional evidence designed to support the State's contention that Parker was the shooter or that the trial court findings in support of the imposition of a death sentence relied on such evidence is irrelevant and cannot cure the Sixth Amendment defect in the criminal conviction. The evidence not submitted at the original 1983 trial does not change the appellate courts' conclusions that the jury verdict at that trial was sustainable solely on grounds of felony murder. And, of course, the trial court and appellate court

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2 The re-sentencing trial court's statement in support of its sentencing decision that "Parker admitted later to actually shooting the victim in the head" that the State cites (Opp. at 9-10) in support of its argument that *Tison* and *Enmund* do not apply is based on the Williams testimony. That testimony was part of the 1983 trial record. Both the Supreme Court of Florida in 1998 and the Eleventh Circuit in 1992 concluded, however, that irrespective of the Williams testimony, the 1983 conviction of Parker was sustainable solely on felony murder grounds. *See Parker IV*, 974 F.2d at 1576-77; *Parker V*, 721 So. 2d at 1152.

3 The evidence the State cites (Opp. at 9-10) concerning the claimed demand by Parker to hand over the gun is based exclusively on the testimony of Parker's co-defendant, Terry Wayne Johnson. Johnson did not testify at Parker's 1983 trial. Johnson, who is serving a life sentence with the possibility of parole as early as 2007 for those crimes, agreed to testify at Parker's 2000 re-sentencing hearing.

findings to which the State refers in its opposition to this petition do not constitute the jury determination guaranteed by the Sixth Amendment as required under *Ring* and *Blakely*.

B. The Court Should Grant the Petition to Address Whether Evidence of a Defendant's Pre-Rights Invocation State of Mind Is Sufficient to Establish Post-Rights Invocation Initiation Under *Edwards v. Arizona* and *Michigan v. Jackson*

In opposition to the second question presented on this petition, the State again ignores Parker's legal argument and instead argues the facts. In doing so, the State repeats the errors of the Supreme Court of Florida, which improperly relied exclusively on pre-rights invocation evidence of Parker's claimed desire to cooperate, and then proceeds to compound the error through extensive citations to Parker's response to the unasked-for, state-initiated May 7 interrogation.

Parker does not deny that *prior* to his invocation on May 5 of his right to counsel and *after* the May 7 approach by a detective for purposes of conducting a further interview, he indicated a willingness to cooperate. What Parker does dispute, however, is that such evidence is competent to demonstrate that during the period *after* he invoked his rights and *before* he was approached for a further interview he initiated that further interview. Parker contends that this Court should grant certiorari to address the competence of pre-rights invocation evidence to establish post-rights invocation initiation of a custodial interview. No amount of citations to or repetitions of this incompetent pre-rights invocation evidence, as the State has done, will serve to establish the post-rights invocation initiation required by *Edwards* and *Jackson*.

Nor can the evidence of how Parker responded to the May 7 approach by a detective occasioned by that detective's

understanding that Parker wished to cooperate establish that Parker initiated the interrogation. If the detective was barred from asking Parker to cooperate without Parker's initiation, Parker's response to the detective's May 7 inquiry concerning his willingness to cooperate does not matter. Absent Parker's initiation of the interrogation, Parker's response to such an approach is legally irrelevant, and no more admissible under *Edwards* and *Jackson* than any other statement he made during that May 7 interview.

The plain fact, that the State desperately seeks to avoid, is that, in violation of this Court's clear rulings in *Edwards* and *Jackson*, the Supreme Court of Florida has impermissibly inferred Parker's post-rights invocation initiation of a further interview from his pre-rights invocation desire to cooperate. The State here seeks to further stray from the constitutional requirements of *Edwards* and *Jackson* through its reliance on what Parker stated after the detective's impermissible approach on May 7 for purposes of obtaining a statement. As Parker demonstrated in his petition for certiorari, when the pre-rights invocation evidence relied upon by the Supreme Court of Florida is stripped away, there is no evidence from which to infer a post-rights invocation initiation by Parker. (Petition at 17-18). Far from indulging "every reasonable presumption against waiver," as mandated by *Jackson*, 475 U.S. at 633 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)), the State would have this Court permit to stand a finding of initiation based on the incarcerated defendant's pre-rights invocation and post-interrogation statements. Florida's very insistence that such an exercise is permitted under *Edwards* and *Jackson* demonstrates the need for Supreme Court review.

CONCLUSION

Petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

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Respectfully submitted,

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